Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-159

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, Affiliated Local Union 597,

Petitioner,

v.

LINBECK CONSTRUCTION CORP., A Texas corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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A. The decision above conflicts with and frustrates the national labor policy established by this Court in *Local 20, Teamsters, Etc., Union v. Morton*, 377 U.S. 252, and conflicts with the "American Rule" of attorneys' fees awards set forth in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 8

B. The decision above decided that in a §303 damage suit, the award of attorneys' fees incurred in prior NLRB proceedings was proper, even though they were not incurred in an attempt to effectuate a resumption of work, were not provided for by statute or contract, and there was no finding of any bad faith action by the party against whom they were assessed. 13

C. The decision above so far departed from, and sanctioned such a departure from, the accepted and usual course of proceedings, as to call for this Court's exercise of its power of supervision, in that the decision ignored principles of justice and fair play, improperly applied the doctrine of res judicata or collateral estoppel to the facts of the case, refused to require any mitigation of damages, but allowed their aggravation, and allowed the plaintiff to determine the amount of damage it would extract from the defendant. 14

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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1977

No.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, Affiliated Local Union 597,

Petitioner,

v.

LINBECK CONSTRUCTION CORP.,
A Texas corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals, Fifth Circuit dated February 28, 1977.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is reported at 547 F.2d. 948, and is printed in the Appendix at p. A-48. The Order Granting Partial Summary Judgment entered by the United States District Court for the Eastern District of Florida, from which an Interlocutory Appeal was taken, resulting in the above decision, is printed in the Appendix at p. A-41. The Order setting forth the District Court's opinion pursuant to 28 U.S.C. 1292(b) that the Order Granting Partial Summary Judgment involved a controlling question as to which there was substantial ground for difference of opinion, is printed in the Appendix at p. A-46. The National Labor Relations Board Decision and Order that formed the basis of this action is reported at 85 LRRM 1579, and printed in the Appendix at p. A-1.

JURISDICTION

The decision of the United States Court of Appeals, Fifth Circuit, was entered on February 28, 1977. A timely Petition for Rehearing was denied on June 14, 1977. A copy of the Judgment entered February 28, 1977 is printed in the Appendix at p. A-55. The notice of the entry of an order denying the Petition for Rehearing is printed in the Appendix at p. A-56. The jurisdiction of the District Court was invoked pursuant to §303(a) and (b) of the Labor-Management Relations Act, 29 U.S.C. §187. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1) and §2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether attorneys' fees incurred by the prevailing party in a prior same-party NLRB proceeding are a proper element of damages in a §303 suit where there was no finding by the NLRB of a bad faith or frivolous defense by the charged party?

2. Whether attorneys' fees incurred by the prevailing party in a prior same-party NLRB proceeding are a proper element of damages in a §303 suit, where, in addition to the limiting factor above stated, they were not incurred or necessitated in an attempt to force the charged party to cease illegal activity and resume work; not authorized by statute, and not agreed to in a contract?

3. Whether the lower court so deviated from the essential requirements of law as to call for this Court to exercise its review power, by concluding in this case that the award of attorneys' fees was justified because attorneys' fees and litigation expenses can be recovered in a §303 suit when they arise from plaintiff's participation in prior same-party NLRB proceedings and were necessitated by its attempt to force a defendant to cease illegal activity and to resume work, considering the following uncontradicted facts? On May 11, 1973, a one-day violation of §8(b)(4)(i)(ii)(B) of the Labor-Management Relations Act, was determined to have been committed by the National Labor Relations Board. The result was not a shutdown or work stoppage, but six ironworkers did leave the job. No violation occurred after May 11th, and the job was completed without further incident. The ironworkers had no collective bargaining agreement with Linbeck. On July 17th, 1973, some nine weeks later, a hearing on the violation was held before an Administrative Law Judge. The preparation for this hearing, briefs submitted to the Administrative Law Judge, appeal procedures, etc., comprised the attorneys' fees incurred by

the charging party—all of which could have been avoided by filing the §303 action prior thereto.

STATUTES INVOLVED

1. Section 8(b)(4)(i)(ii)(B) of the Labor-Management Relations Act, as amended, 29 U.S.C. §158(b)(4)(i)(ii)(B):

> "(b) It shall be an unfair labor practice for a labor organization or its agents-- . . .
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce, or in an industry affecting commerce, where in either case an object thereof is-- . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

2. Section 303(a) and (b) of the Labor-Management Relations Act, as amended, 29 U.S.C. §187(a) and (b):

> "§187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages
>
> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the costs of the suit."

STATEMENT OF THE CASE

This cause arose when the Respondent, Linbeck Construction Corporation, hereinafter referred to as "Respondent" or "Linbeck," filed an action for damages pursuant to 29 U.S.C. §187 against the Petitioner, International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union 597, hereinafter referred to as "Petitioner" or "Ironworkers," in the United States District Court for the Middle District of Florida, Jacksonville Division, on July 22, 1974.

The complaint alleged a violation of the Labor-Management Relations Act by the Ironworkers in May, 1973, and sought damages in excess of Twenty Thousand ($20,000.00) Dollars, together with interest and the costs of attorneys' fees. The complaint alleged the filing by Linbeck of an unfair labor practice charge with the National Labor Relations Board (Case No. 12-CC-833) on May 17, 1973, the issu-

ance of an Administrative Complaint, and a hearing before a duly designated Administrative Law Judge, on July 17, 1973, at which time all parties were present, represented by counsel, and given the opportunity to present testimony and interrogate witnesses. The complaint further alleged the issuance of a decision by the National Labor Relations Board reported at 208 NLRB No. 74, and attached a copy of the said decision as an exhibit to the complaint. The decision found a one-day violation of the Act by the Ironworkers, beginning and ending on May 11, 1973. No other violation was found or upheld.

Petitioner filed Motions to Dismiss and to Strike, which were denied, and on October 15, 1975, Linbeck filed its Motion for Partial Summary Judgment directed towards attorneys' fees that had been incurred by Linbeck in preparing for the administrative hearing, attendance at the hearing, and the Appellate proceedings had before the National Labor Relations Board. On December 5, 1975, Ironworkers filed its Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and asked that summary judgment instead be entered on the Ironworkers behalf in that no damage to Linbeck had been proved and further that no damage to Linbeck could be proved.

On December 15, 1975, the trial court entered its order granting partial summary judgment on behalf of Linbeck. As amended, that Order awarded summary judgment to Linbeck for attorneys' fees in the sum of $15,831.86. Through interrogatories, the Ironworkers discovered the actual damage done to Linbeck on May 11, 1973. Excluding attorneys' fees, these damages amount at best to approximately $389.00 plus a questionable claim for damage to Linbeck's reputation. This is conceding arguendo that any damage at all was suffered by Respondent. In establishing the one-day violation, Linbeck incurred $15,831.00 in attorneys' fees.

An interlocutory appeal was timely taken to the Fifth Circuit, where the case was placed on the Court's Summary Calendar. Thereafter, without oral argument, the decision sought to be reviewed was rendered.

On appeal, Petitioner argued that in a §303 damage suit, attorneys' fees incurred in a prior same-party NLRB proceeding were not a proper element of damages. Petitioner especially urged they were not proper in this case, where they were not incurred in an attempt to effectuate a resumption of work. It was also argued that the attorneys' fees awarded were not reasonable--not the amount vis-a-vis the work involved--but because they should not have been incurred, and in no way should they have been charged to the Ironworkers.

As noted above, however, the United States Court of Appeals, Fifth Circuit, affirmed the trial court's order, and denied a rehearing on June 14, 1977. Upon Petitioner's Motion for Stay of Mandate, the lower court entered its order staying the issuance of Mandate through July 28, 1977.

This Petition is filed within the time allowed by the lower court to keep the aforesaid order in effect.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals, Fifth Circuit, (*Linbeck Const. Corp. v. Ironworkers*, 547 F.2d. 948), (A) frustrates the national labor policy concerning damages awardable in §303 suits arising from unfair labor

practices; (B) decided an important question of federal law which has not been, but should be, settled by this Court; and (C) departed so far from the accepted and usual course of judicial proceedings as to call for this Court's review.

A. THE DECISION ABOVE CONFLICTS WITH AND FRUSTRATES THE NATIONAL LABOR POLICY ESTABLISHED BY THIS COURT IN *LOCAL 20, TEAMSTERS, ETC., UNION v. MORTON*, 377 U.S. 252, AND CONFLICTS WITH THE "AMERICAN RULE" OF ATTORNEYS' FEES AWARDS SET FORTH IN *ALYESKA PIPELINE SERVICE CO. v. WILDERNESS SOCIETY*, 421 U.S. 240.

Alyeska Pipeline, supra, is the latest decision on attorneys' fees as damages this Court has rendered. Admittedly, it is not precisely in point in that the Labor-Management Relations Act was not involved, and specifically, the point involved was the "private attorney general" theory that had become popular with lower courts. However, the principles set forth in that decision have much broader application.

This Court affirmed the "American Rule" regarding recovery of attorneys' fees from the unsuccessful party. That rule is that generally, attorneys' fees are not recoverable unless they are provided for in the statute involved, or are agreed to be an element of damages in a contract between the parties. Exceptions have been approved, or have been suggested, as in the instance where a "common fund" results from the litigation--a beneficial recovery--for persons not parties to the litigation.

In a thorough discussion of the origin and evaluation of this aspect of the law of damages, this Court made it clear that the "American Rule" is generally still the law.

Focusing then, on the aspect of attorneys' fees as damages in a §303 action, it appears that the law is settled that attorneys' fees *for the bringing of the §303 action itself are not recoverable*. The "American Rule" is followed.

The law is not quite so clear, however, when there have been prior proceedings involving the same dispute, and same parties, before the National Labor relations Board. If attorneys' fees incurred by the §303 plaintiff in the prior NLRB proceedings are claimed as damages in the §303 action, disagreement and uncertainty appear in the decisions of the Circuit Courts.

The Fifth Circuit, following the lead of the Sixth Circuit in *Teamsters Local 984 v. Humko Co.*, 287 F.2d. 231 (6th Cir. 1961), (upheld attorneys' fees incurred in removing a picket line) expanded this lead, and now uniformly holds that the attorneys' fees incurred as a result of participation in prior NLRB proceedings, in order to force a cessation of illegal activity and the resumption of work, are recoverable by the successful litigant.

No basis for this rule of law has ever been set forth by any court so holding. As pointed out by the Ninth Circuit in *Mead v. Retail Clerks Int. Ass'n, Etc.*, 523 F.2d. 1371 (9th Cir. 1975),

> "The earliest case awarding such attorneys' fees simply asserts that fees paid 'to bring about the removal of the picket line . . . are proper items of damage.' (cite deleted) Subsequent cases simply cite the prior decisions, adding nothing to the rationale."

It is submitted that decisions of this nature, flying in the face of the "American Rule"—when there is no rationale or logic used to arrive at or support such decisions—are, quite simply, improper, and vulnerable to the reasoning of *Alyeska Pipeline*, supra.

When it enacted 29 U.S.C. §187, Congress of course was interested in regulating unfair and extreme conduct on the part of the ever more powerful labor unions. At the same time, it was unwilling to unnecessarily restrict organized labor's main and most important bargaining leverage, the threat, or use of, direct or indirect economic sanctions. Accordingly, Congress provided for an administrative remedy when certain conduct is engaged in by unions, with an aim to swiftly alleviating the proscribed conduct. The remedy provided was intended to bring about a termination of this conduct, through an order of the National Labor Relations Board, or a United States District Court: National Labor Relations Act, as amended 29 U.S.C. §§158 (b)(4); 160(c) and (l).

Realizing that in many cases, mere alleviation of the unlawful conduct would still leave management economically injured, §303 of the Act was worded to allow the recovery of damages to business or property caused by such conduct. (§303b)

In discussing the Congressional intent attending the enactment of §303, this Court said in *Local 20, Teamsters, Etc., Union v. Morton*, 377 U.S. 252, 260, 84 S. Ct. 1253, 1259 (1964), that it was the

> ". . . congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by §303, *should be limited to actual, compensatory damages.*" (Emphasis added)

Thus, this Court supports the position that under a §303 action for damages, only the actual compensatory damages suffered by the employer are recoverable. Punitive-

type damages are not allowed, as plaintiffs in §303 actions should be limited to recovery of those damages, as defined in traditional tort law, that are the direct consequence of the wrongful conduct.

There is nothing in §303(a) or (b) to suggest this statute does not mean exactly what this Court has said it means. (*Local 20, Teamsters v. Morton, supra*)

The §303 action was intended to financially protect employers who were economically damaged by unlawful union activity; a Senate report on the bill shows the following intent:

> ". . . there is no reason why the same remedy should not be available against the labor unions as is available against every other wrongdoer." (Legislative History of the Labor-Management Relations Act of 1947, at p. 460, U.S. Government Printing Office, 1974)

Your Petitioner submits that the Ninth Circuit's opinion in *Mead*, supra, arrived at with due consideration to *Alyeska*, supra, is logical, rational, well-reasoned, and should be the national law on this point. The Court in *Mead*, supra, reasoned at p. 1381:

> "It would be particularly inappropriate to depart from the general rule in a case such as this. The Board has adhered to the general "American Rule" that the prevailing party's attorneys' fees are not ordinarily recoverable from the losing party. *Heck's, Inc.*, 191 N.L.R.B. 886, 889 n. 19 (1972), *modified and enforced, Food Store Employees Local 347 v. NLRB, 139 U.S.App.D.C. 383, 476 F.2d. 546 (1973), reversed on other grounds, NLRB v. Food Store Employees, Local 347, 417 U.S. 1, 94 S. Ct. 2074, 40*

L.Ed.2d. 612 (1974). The Board recently reasserted its adherence to this general rule but held that the charged party may be required to reimburse the charging party's expenditure for attorneys' fees and other costs of litigation if the charged party's defense before the Board is frivolous or in bad faith. *Tiidee Products*, 194 N.L.R.B. 1234, 1236-37 (1972), *modified and enforced, International Union of Electrical Workers v. NLRB*, 163 U.S.App.D.C. 347, 502 F.2d. 349 (1974); *see generally NLRB v. Food Store Employees, Local 347, supra*, 417 U.S. at 3-8, 94 S.Ct. 2074.

If attorneys fees incurred in Board proceedings could be recovered in every case by subsequent section 303 action, it would circumvent the Board's rule allowing recovery of such fees only where the defense is frivolous or in bad faith . . .

It is for the Board, not the courts, to determine whether the conflicting interests are best resolved by imposing litigation costs upon the defeated party before the Board, Id. at 8-9, 94 S.Ct. 2074.

Finally, the determination of whether a union's conduct violates section 8(b)(4) may be made either by the Board, as in this case, or by the court in a suit under section 303 . . . If there has been no prior Board proceedings and the illegality of the clause had been established in this action, the Meads could not have recovered the attorneys' fees attributable to that incremental effort. The result should be no different because this essential element was established in a separate proceeding before the Board." Emphasis Added)

Petitioner submits that blind adherence to the Fifth Circuit's rule encourages a charging party to pursue two separate actions in order to recover attorneys' fees not ordinarily recoverable.

Being in conflict with NLRB policy, prior pronouncements of this Court, and at least one other circuit, the Fifth Circuit's rule should be quashed by this Court's ruling that attorneys' fees incurred by the prevailing party in prior same-party NLRB proceedings are not a proper element of damages in a subsequent §303 action.

B. THE DECISION ABOVE DECIDED THAT IN A §303 DAMAGE SUIT, THE AWARD OF ATTORNEYS' FEES INCURRED IN PRIOR NLRB PROCEEDINGS WAS PROPER, EVEN THOUGH THEY WERE NOT INCURRED IN AN ATTEMPT TO EFFECTUATE A RESUMPTION OF WORK, WERE NOT PROVIDED FOR BY STATUTE OR CONTRACT, AND THERE WAS NO FINDING OF ANY BAD FAITH BY THE PARTY AGAINST WHOM THEY WERE ASSESSED.

This reason for granting the Writ sets forth the result reached in this case by the court below, and shows the possible effect of the rule pronounced by the Fifth Circuit.

The result reached in this particular case expands the rule of the Fifth Circuit far beyond decisions of any court, even the Fifth Circuit itself.

As noted above, for some time the Fifth Circuit has held that attorneys' fees are a proper element of damages in a §303 action when incurred at prior NLRB proceedings in an attempt to effectuate a resumption of work and cessation of the illegal activity.

Even though this in itself oversteps principles set forth by this Court, in the case at bar, all of these fees were incurred *after the violation had ceased*, and while work was progressing smoothly. The Board itself seemed to suggest

disapproval of this proceeding in its Decision and Order, Appendix, p. A-32, where it is said (discussing possible ulterior motives):

> ". . . As evidence of this Respondent's counsel points to the refusal of the General Counsel to consider any settlement without the concurrence of Linbeck, and to Linbeck's refusal to accept any adjustment or settlement of the case without a formal Board order and consent decree. Normally in the kind of situation disclosed by the evidence here, absent a history of recidivism or a past course of illegal conduct, an informal settlement agreement in which the Respondent committed itself not to engage in any of the conduct with which it is charged, would have seemed to me an adequate remedy effectuating the policies of the statute and a proper conservation of public funds. There is no adverse history disclosed here. There is no explanation as to why a formal consent decree should have been required as a condition of settlement of the case. Furthermore, the Respondent points out, it has indicated its willingness to consider even such a decree, provided that legitimate inability to supply ironworkers because of shortages would not be considered an unfair labor practice."

Attorneys' fees were not provided for by contract between the parties. In fact, and the Board so found, that at no time did the Ironworkers have a contract with Linbeck, and were under no obligation to man Linbeck's job.

The Board found no bad faith on Petitioner's part, and made no finding that the defense was frivolous. In such a situation as this case presents, *there is absolutely no justification for the award of attorneys' fees.*

C. THE DECISION ABOVE SO FAR DEPARTED FROM, AND SANCTIONED SUCH A DEPARTURE FROM,

THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS, AS TO CALL FOR THIS COURT'S EXERCISE OF ITS POWER OF SUPERVISION, IN THAT THE DECISION IGNORED PRINCIPLES OF JUSTICE AND FAIR PLAY, IMPROPERLY APPLIED THE DOCTRINE OF RES JUDICATA OR COLLATERAL ESTOPPEL TO THE FACTS OF THE CASE, REFUSED TO REQUIRE ANY MITIGATION OF DAMAGES, BUT ALLOWED THEIR AGGRAVATION, AND ALLOWED THE PLAINTIFF TO DETERMINE THE AMOUNT OF DAMAGE IT WOULD EXTRACT FROM THE DEFENDANT.

The gross oversight that has affected this case from the Order Granting Partial Summary Judgment through the decision of the Fifth Circuit, supra, *has been that the fees involved herein were not incurred in an attempt to get Petitioner to cease unlawful activity and resume work.*

Completely overlooked has been the fact that there was only *a one-day violation* of the Act, that began and terminated on May 11, 1973. The trial court clearly accepted this, and stated in its Order that Linbeck could recover actual damages for that one day only, and that those damages suffered on May 11, 1973 remain to be established.

The import of this fact has been completely ignored, overlooked, or misunderstood, however.

Thus, the panel decision, *Linbeck*, supra, held that the trial court "adequately addressed the Union's contention that litigation expenses should be recoverable only when they are incurred in an effort to force the defendant to resume work." The panel then quoted the trial court:

"Literally, defendant's ironworkers had resumed work on May 11, 1973. This fact alone, however, is not controlling of the issue here. On May 17, when the unfair labor practice charge was filed, defendant's men had not resumed work. The fact that they subsequently did, did not render the charge of illegal activity moot. It cannot be said that the pendency of the action had no bearing on defendant's decision to resume work. Nor can it be said that continued prosecution had no influence on their decision to stay on the job. If defendant could conduct illegal activities of short duration but voluntarily cease those activities prior to judicial review, then defendant could successfully circumvent 29 U.S.C. §187 by placing an inordinate burden of prosecution, whether successful or not, on plaintiff. This cannot be permitted."

The doctrine of res judicata or collateral estoppel applies to Linbeck, just as it does the Ironworkers. Although an unlawful purpose from May 11 to May 30, 1973, and thus a violation, was argued for by Linbeck before the administrative law judge and then the Board, the findings of both were exactly and unquestionably contrary. Linbeck must accept the one-day violation finding, just as the Ironworkers must.

This is a critical fact overlooked or ignored by both the trial court and the panel decision. The point has been adjudicated and decided by an administrative law judge and by the Board itself after thorough consideration of all facts. All parties were allowed to present evidence on the point. All parties were represented by counsel, had the opportunity of cross examination, and were given every opportunity to present evidence. The Judge, and the Board respectively, even had briefs submitted covering the issues.

The above is critical, because when the fact is realized and recognized, *the portion of the opinions quoted above become nonsensical.*

Your Petitioner and its members *had no duty to "resume" work.* They were not committing any violation of law, and it was and is uncontradicted that they preferred other jobs to the one in the instant case. The Ironworkers did not even have a contract with Linbeck.

Whether they resumed work or not is immaterial, yet it seems to be the heart of the decision. Although actual damages have been limited to the one-day violation, attorneys' fees have been awarded for every aspect of the NLRB proceeding. This result is so unusual, is such a deviation from the law that it screams for this Court's review.

The award deviates also from the rule requiring an injured party to mitigate its damages.

Even the Fifth Circuit reaffirmed the duty on a Section 303 plaintiff in *Vulcan Materials Company v. United Steelworkers of America, AFL-CIO,* 430 F.2d. 446 (5th Cir. 1970), wherein it stated on p. 458:

> ". . . A plaintiff in a Section 303 suit clearly has the duty to minimize damages if it is reasonably possible to do so. International L. & W. Union v. Hawaiian Pineapple Co., 9 Cir., 1955, 226 F.2d. 875, 880, cert. den. 351 U.S. 963, 76 S.Ct. 1026, 100 L.Ed. 2d 1483; International Longshoremen's, etc. v. Juneau Spruce Corp., 9 Cir., 1951, 189 F.2d. 177, aff'd. 342 U.S. 237, 72 S.Ct. 235, 96 L.Ed. 275 z)1952)."

The decision complained of not only does not require this, it allows for the aggravation of damages in that Linbeck

could choose whenever it wanted to stop incurring attorneys' fees. Before the Board hearing; before appealing to the full Board; before taking the decision to Circuit Court; or before applying to this Court. It could choose how much to "punish" Petitioner.

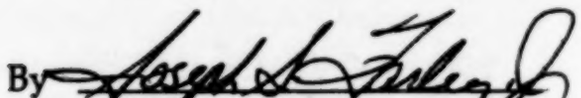
This just cannot be the law of the United States.

CONCLUSION

For all of the above reasons, the decision of the Fifth Circuit should be reviewed by this Court in the interest of both justice and uniformity, and this Petition for a Writ of Certiorari should be granted.

Respectively submitted,

MAHON, FARLEY & VICKERS

By 
JOSEPH S. FARLEY, JR.
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari to the United States Supreme Court have been furnished by United States first class mail on this 28th day of July, to the following:

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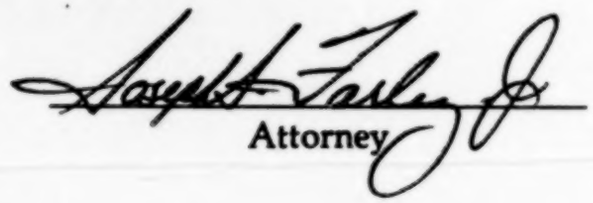
Attorney

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

CASE NO. 12-CC-833

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFFILIATED
LOCAL UNION NO. 597, AFL-CIO

AND

LINBECK CONSTRUCTION CORPORATION

DECISION AND ORDER

On September 20, 1973, Administrative Law Judge Charles W. Schneider issued the attached Decision in this proceeding. Thereafter, the Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-major panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions

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[1] The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. The Administrative Law Judge found, and we agree, that Respondent violated Section 8(b) (4) (i) (B) of the Act by engaging in, and by inducing and encouraging employees of Linbeck Construction Corporation to engage in, a strike against Linbeck with an object of forcing or requiring Linbeck to cease doing business with Architectural Products, Inc.

As set forth in detail in the Administrative Law Judge's Decision, Respondent's business agent, on the morning of May 11, 1973, asked ironworkers working for Linbeck if they would like to go to another project which offered considerable overtime pay. Within 30 minutes, the six ironworkers left the jobsite and were given referrals to the other project by the business agent. The Administrative Law Judge correctly concluded that offering the Linbeck crew the opportunity to earn overtime pay by transferring was a pretext. The record supports the finding that the ironworkers were withdrawn from the jobsite because Architectural Products, Inc., a subcontractor, had assigned work claimed by the Respondent to its own employees represented by a different union. Thus, the object of the work stoppage was to attempt to force Linbeck, a neutral employer, to cease doing business with Architectural Products, Inc.

The General Counsel, in filing limited exceptions with respect to the violation of Section 8(b) (4) (i) (B) of the Act, requests that the Board substitute for the language used in the Administrative Law Judge's recommended Order and notice the language normally used to remedy this type of violation. The Charging Party filed similar exceptions. We

find merit in the exceptions and shall accordingly amend the recommended Order and notice.

2. The Administrative Law Judge found that the Respondent did not violate Section 8(b) (4) (ii) (B) of the Act by threatening or coercing Linbeck for a proscribed objective. Although there is no evidence that any of Respondent's agents expressly threatened Linbeck, both the General Counsel and the Charging Party contend that, since Respondent successfully induced the work stoppage against Linbeck, Respondent's conduct necessarily had the effect of threatening Linbeck. We agree. As stated in *Local 370, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Baughan Plumbing and Heating Company, Incorporated)*, 157 NLRB 20, 21, "The Board has consistently held that a strike or work stoppage against a neutral employer constitutes restraint and coercion of such employer within the meaning of clause (ii) of Section 8(b) (4) of the Act." (Footnote omitted.) Accordingly, we find, contrary to the Administrative Law Judge, that Respondent violated Section 8(b) (4) (ii) (B) of the Act by effectively inducing the work stoppage against Linbeck for a proscribed objective.

3. Both the General Counsel and the Charging Party except to the Administrative Law Judge's finding that Respondent did not violate Section 8(b) (4) (ii) (B) of the Act by refusing to refer ironworkers to Linbeck from May 11 to May 29, 1973. We agree with the Administrative Law Judge that the evidence fails to prove that Respondent unlawfully refused to refer ironworkers. Although the evidence shows that Linbeck requested ironworkers on May 11, 1973, and that Respondent did not refer any employees until May 30, 1973, the evidence also shows

that there was a shortage of ironworkers in the area.[2] On the state of the record herein, it would be at least as valid to infer that the failure to refer ironworkers was caused by the lack of ironworkers as to infer that it was caused by a proscribed objective. Accordingly, we find that the General Counsel has not met his burden of proof and we shall adopt the Administrative Law Judge's dismissal of this allegation.

Amended Conclusions of Law

Delete Conclusion of Law 3 in the Decision of the Administrative Law Judge and substitute therefor the following:

3. By engaging in, and by inducing and encouraging employees of Linbeck Construction Corporation to engage in, a strike against Linbeck to cease doing business with Architectural Products, Inc., the Respondent has violated Section 8(b) (4) (i) (ii) (B) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby

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[2] Member Kennedy would find that Respondent's refusal to refer ironworkers to Linbeck from May 11 to May 29, 1973, also violated the Act. He agrees with the majority that referring the Linbeck crew to the Kennedy project was a pretext and Respondent thereby violated Sec. 8(b) (4) (i) (B) and 8(b) (4) (ii) (B) of the Act. The refusal to supply ironworkers until the eve of the 10(1) injunction proceeding was just as unlawful as the removal of the ironworkers from the job, in Member Kennedy's view. Logic dictates that if the withdrawal was a pretext then the failure to supply replacements was also a pretext.

orders that the Respondent, International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union No. 597, AFL-CIO, Jacksonville, Florida, its officers, agents, and representatives, shall take the action set forth in said recommended Order, as modified below:

1. Delete paragraph 1 of the recommended Order and substitute therefor the following:

"1. Cease and desist from:

"(a) Threatening, coercing, or restraining Linbeck Construction Corporation, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Linbeck Construction Corporation, or any other person, to cease doing business with Architectural Products, Inc.

"(b) Engaging in, or inducing or encouraging any individual employed by Linbeck Construction Corporation, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require Linbeck Construction Corporation, or any other employer or person, to cease doing business with Architectural Products, Inc."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C.

/s/ Howard Jenkins, Jr., Member
/s/ Ralph E. Kennedy, Member
/s/ John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We hereby notify you that:

WE WILL NOT threaten, coerce, or restrain Linbeck Construction Corporation, or any other person engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring any such person to cease doing business with Architectural Products, Inc.

WE WILL NOT engage in, or induce or encourage any individual employed by Linbeck Construction Corporation, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require Linbeck Construction Corporation, or any other person, to cease doing business with Architectural Products, Inc.

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFFILIATED
LOCAL UNION NO. 597, AFL-CIO

(Labor Organization)

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 400 West Bay Street, Jacksonville, Florida 32202, Telephone 904-791-2168.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

CASE NO. 12-CC-833

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFFILIATED
LOCAL UNION NO. 597, AFL-CIO

and

LINBECK CONSTRUCTION CORPORATION

Peter E. Donnelly, Esq.,
for the General Counsel.
Mahon & Mahon, by *Lacy Mahon, Jr., Esq.*,
Jacksonville, Fla.,
for the Respondent.
E. John Dinkel, III, Esq.,
Tampa, Fla.,
(*Alley, Rock and Dinkel* of counsel),
and *Oscar Hibler, Esq.*,
Houston, Texas,
for the Charging Party.

DECISION

CHARLES W. SCHNEIDER, Administrative Law Judge: On May 17, 1973, Linbeck Construction Corporation, the Charging Party, filed an unfair labor practice charge, and on May 25, 1973 an amended charge, against

International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union No. 597, AFL-CIO, the Respondent, alleging that the Respondent had violated Section 8(a) (4) (i) (ii) (B) of the National Labor Relation Act (29 U.S.C. 151 *et seq.*). On June 25, 1973 the Regional Director issued a complaint and notice of hearing upon the charges. In sum the complaint alleged that the Respondent struck, and induced and encouraged employees of Linbeck, the Charging Party, to strike, threatened Linbeck, and refused to refer Iron Workers to him with an object of compelling Linbeck and other persons to cease doing business with Architectural Products, Inc. The Respondent duly filed its answer denying the commission of unfair labor practices.

Pursuant to notice a hearing was held before me at Jacksonville, Florida on July 17, 1973. All parties were represented at the hearing by counsel, and were afforded full opportunity to be heard, to introduce material evidence, to present oral argument, and to file briefs. Briefs were filed by the Respondent, the Charging Party, and the General Counsel on, respectively, August 13, August 15 and August 17, 1973. Upon consideration of the entire record and the briefs, and upon my observation of the witnesses, I make the following:

Findings of Fact

I. THE BUSINESS OF LINBECK AND OF ARCHITECTURAL PRODUCTS

Linbeck Construction Corporation is a Texas corporation, licensed to do business in the State of Florida, where it is, and at all times material herein has been, engaged in business as a general contractor in the building and con-

struction industry. Linbeck maintains an office in Jacksonville, Florida, and has been since September 1, 1972, to the present engaged, as the general contractor, in the construction of a multimillion dollar professional office building located at 820 Prudential Drive, Jacksonville, Florida. During the past 12 months, Linbeck, in the course and conduct of its aforesaid building project, has purchased and received materials and supplies valued in excess of $50,000 which were shipped directly to it from points located outside the State of Florida.

Architectural Products, Inc. is a Florida corporation with its principal office and place of business at Palm Beach Gardens, Florida. It is engaged in business in various cities within the State of Florida as a specialty contractor. During the past 12 months, Architectural has purchased and received at various jobsites in the State of Florida, supplies and materials valued in excess of $50,000, which were shipped directly to it from points located outside the State of Florida. At all times herein, Architectural has had a subcontract with Linbeck to erect and install all exterior wall panels used in the construction of the aforesaid professional office building.

Linbeck and Architectural are now, and have been at all times material herein, engaged in commerce, or in an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union No. 597, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

THE ISSUE

The theory of the General Counsel and the Charging Party is that the Respondent Iron Workers threatened and conducted a strike against Linbeck, the general contractor on the project involved, to compel him to cease doing business with his subcontractor, Architectural Products, because Architectural had assigned the erection of exterior curtain wall panels, known as Corspan, on the building to the Carpenters Union, rather than to the Iron Workers Union.

This the Respondent denies. Though the Respondent has raised some legal arguments, disposed of hereinafter, as I have analyzed the evidence the issue is solely one of motivation. It is conceded that Linbeck's iron workers left the job. The question is why?

THE JURISDICTIONAL AGREEMENT BETWEEN THE UNIONS

For a number of years prior to 1967 a jurisdictional dispute existed between Local 627 of the Carpenters Union, Local 2 of the Bricklayers Union, and the Respondent Iron Workers Union Local 597, as to who should install precast exterior wall panels on buildings in the Jacksonville, Florida area. However, in 1967 the three unions resolved their differences and on October 26 of that year entered into a written agreement signed by the representatives of each, allocating the installation of the panel work among the respective crafts pursuant to certain specified criteria. To the extent material here, the agreement provided that on single story structures, such panels, if not laid in wet

mortar, should be installed by the Carpenters and the Iron Workers with an equal composite working crew. On multi-story buildings, the agreement provided that the panel should be installed in accordance with "the existing agreement between the Bricklayers and Iron Workers International Union."

The terms of the "existing agreement" are not disclosed in the record. However, the testimony indicates that the parties contemplated that, however the work was assigned as between the Carpenters and the Bricklayers, the Iron Workers would share equally with either union. So far as the record discloses, this agreement was continuously observed by the unions until the interposition of Architectural Products, Inc. and the Johns-Manville Corporation on the instant project, when Architectural Products assigned the installation of Corspan exclusively to the Carpenters in accordance with a national policy of Johns-Manville, the manufacturer of the panel, to have it installed by members of that craft.

THE PROJECT

The project involved is the construction of a multi-storied professional office building in the City of Jacksonville. Linbeck is the general contractor. Architectural Products is primarily involved in the sale, and occasionally the installation, of Corspan. Linbeck employed Architectural, under contract, to supply and to install Corspan on the project. Corspan is manufactured by Johns-Manville Corporation. Architectural Products is a distributor of Corspan under contract with Johns-Manville. So far as appears this is the extent of Johns-Manville's interest in the project.

Erection of the panels on this project involves raising them into position and attaching them by toggle bolts to angle irons welded to inserts in the building. Insertion of the angle irons and the welding is performed by members of the Respondent Iron Workers employed by Linbeck, and the assignment of that work is not the subject of controversy.

EMPLOYMENT OF IRON WORKERS

At least one subcontractor on the job, Blair Contracting Company, a structural steel contractor, also employs iron workers. These iron workers, as well as those employed by Linbeck, were secured through the Respondent's hiring facilities in Jacksonville.

Linbeck's principal office is in Houston, Texas. At no time has it had any contract with the Respondent Iron Workers. At all material times the demand for iron workers in the Jacksonville area has exceeded the supply.

Linbeck began to need iron workers for the project about April 1, 1973 and at that time Superintendent Lawson requested John Bowden, business agent of the Respondent, to supply him with such help. However, because of the shortage of iron workers Bowden was unable to furnish any to Linbeck until April 16, at which time he sent Linbeck one man. From then on Linbeck got iron workers intermittently, one or more at a time, until by May 1 there were approximately 1/2 dozen on his payroll. They remained on the job until May 11, 1973, at which time they left under the circumstances which are alleged to constitute the unfair labor practices.

During this period of employment some of Linbeck's

iron workers complained to Respondent's Business Agent Bowden about safety conditions on the job, and also about other workers being permitted to do work in the jurisdiction of the iron craft. Bowden spoke to Lawson about the safety matter, and the conditions were apparently remedied. With respect to the jurisdictional question, Bowden told the iron workers that this was a consequence of his being unable to supply Lawson with a sufficient number of employees to perform the work.

In addition, a number of the iron workers on the job, who were on an 8-hour per day 5 days a week schedule, told Bowden that they would like to be assigned to projects where they could work overtime. The men particularly asked for assignment to the Kennedy project, one involving the construction of an electrical generating plant. Bowden told the men that he would send them at the first opportunity.

THE DISAGREEMENT BETWEEN THE BRICKLAYERS AND THE CARPENTERS

During the month of April, disagreement apparently developed between Bricklayers Local 2 and Carpenters Local 627 as to which of them should be entitled under the terms of the 1967 agreement to erect the Corspan for Architectural Products on the Linbeck job. This disagreement did not involve the Iron Workers since both the Bricklayers and the Carpenters were in agreement that in any event the Iron Workers should participate in the erection with a composite crew. The disagreement revolved around whether Corspan was a precast material.[1]

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[1] The finding as to the apparent disagreement between the Bricklayers and the Carpenters is based on the testimony of Respondent's Business Agent Bowden. Thus his testimony (Tr. page 148):

As an apparent consequence of this disagreement, a meeting of representatives of the Bricklayers Union, the Carpenters Union, and the Respondent was held in Superintendent Lawson's office at the jobsite in late April. This meeting was called by Business Agent Schuman of the Bricklayers. The Carpenters were represented by their Business Agent George Geiger, and the Respondent Iron Workers by John Bowden. Superintendent Lawson was also present.

At this meeting Schuman and Geiger aired their apparently differing interpretations of the 1967 agreement, respecting whether the Bricklayers or the Carpenters should erect the Corspan. Both were in agreement that whichever of them did the work the Respondent Iron Workers would participate in accordance with the terms of the 1967 agreement. Schuman asked Superintendent Lawson to make an assignment of the work. Lawson declined, stating that he had no authority to do so, that it was a matter for Architectural Products to decide, and the meeting ended on that note. Business Agent Bowden did not participate in this discussion. His only participation in the meeting was to speak to Lawson concerning safety conditions on the job.

THE ASSIGNMENT

Approximately May 3, 1973, Robert Boyle, president of Architectural Products, made a formal assignment of the erection of the Corspan to the Carpenters. Respondent's

George (Schuman, business agent of the Bricklayers Union) interpreted it to be that of precast—the carpenters, when they come along, said that this is some other substance; they interpreted it to be another thing, and they got in a hassle over it; I never entered into it.

Business Manager Bowden learned of this assignment approximately May 5, and on May 9 the Carpenters began installing the panels.

Boyle's letter of assignment did not specifically state that the Ironworkers would not participate in the erection.[2]

Business Agent Bowden assumed after hearing of the assignment that the Ironworkers would participate in the erection in accordance with the agreement. He continued to be under this impression until the 11th of May, when he was advised to the contrary under circumstances to be described.[3]

[2] The text of the letter, addressed to Carpenters Local 627, and with copies to Superintendent Lawson, and to William M. Malone, Johns-Manville Sales Corporation, Atlanta, Georgia, is as follows:

> Please consider this letter as assignment of the subject work to the Carpenters Local Union #627.
>
> Johns-Manville Corspan panels are an asbestos cement extrusion and the assignment is made based on the existing national practice for this product.
>
> Please accept our apologies for not making this assignment sooner but we were under the false impression that when we signed the contract with your local, the contract itself acted as an assignment.

[3] This finding is based in part on Bowden's testimony and in part on inference. Bowden testified that on May 11 he advised Respondent's job steward for Linbeck, Thomas Canady, that he assumed that the Iron Workers would *not* participate in the erection of the Corspan. He later testified, however, that at the time of the May 11 events he was operating under the assumption that the Iron Workers would get half the Corspan work, in accordance with the April agreement of the three unions. This latter testimony seems in accord with the occurrences on May 11.

THE REQUEST FROM KENNEDY

On May 10, 1973, Bowden received a request from the contractor on the Kennedy project for a crew of ironworkers for an emergency job. This job involved overtime at double pay—either 10/6 or 10/7, the record is not clear which.[4]

MAY 11; THE IRONWORKERS LEAVE LINBECK'S JOB

On the following day, May 11, Linbeck's ironworkers reported to the job at the regular hour, 7 a.m., and began work as usual. During the next several hours a series of conversations took place involving Ironworker Steward Thomas Canady, Superintendent Lawson, Business Agent Bowden and Ironworker Foremen Charles Thrasher and Ray Hoffman, following which Linbeck's ironworkers left the job and went to work on the Kennedy project. There is some inconsequential conflict in the testimony as to the sequence and the initiation of these conversations, but substantially none as to their import. I have reconstructed the essential particulars as follows:

At about 8:30 a.m. Steward Canady came to Superintendent Lawson's office and asked Lawson whether the ironworkers were going to participate in the erection of the Corspan. Lawson advised Canady that the work had been assigned by Architectural Products to the Carpenters, and he showed Canady a copy of the letter of May 3, 1973.

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[4] Business Agent Bowden's testimony was that it was a 10/6 job (that is 10 hours a day, 6 days a week); the testimony of Charles W. Thrasher, ironworker's foreman for Linbeck, is that it was a 10/7 job (10 hours, 7 days).

Canady then telephoned Business Agent Bowden, who indicated to Canady his disinterest in the assignment, but nevertheless asked Canady to have Lawson call him (Bowden).

Lawson then telephoned Bowden, who asked Lawson whether the ironworkers would participate in the erection of the panels. Lawson gave Bowden the same reply he had given Canady. Bowden then asked Lawson to have Canady call him (Bowden). Within the next several minutes Bowden spoke to Canady and to Ironworker Foreman Thrasher, a member of the Ironworkers, and asked them whether they and the crew would like to go on the Kennedy job. Canady and Thrasher replied in the affirmative and within 30 minutes all of Lawson's ironworkers left the job, were given referrals by Bowden to the Kennedy project and went to work there. Superintendent Lawson observed the men's preparation for leaving and gave them their paychecks. They gave him no reason for leaving the job and apparently he did not ask for any. By 8:45 a.m. the ironworkers were gone.

At about 9:30 a.m. Superintendent Lawson sought to reach Business Agent Bowden by telephone but was unable to. At about 11:45 a.m. he called again, this time reaching Bowden. Lawson asked Bowden why he had pulled the men off the job. The gist of Bowden's reply is that Linbeck and Architectural had not abided by the area practice, the 1967 agreement, in assigning the Corspan work and that he (Bowden) "didn't want...outsiders coming in and disrupting the trades council by not abiding by the local agreements." Lawson replied that Architectural Products and Johns-Manville did not consider the material to be precast and therefore not subject to the 1967 agreement. Lawson said that it was not his responsibility

to make the job assignment, to which Bowden agreed, adding, however, that as the general contractor Lawson was responsible for the actions of Architectural. Bowden also told Lawson that the men were dissatisfied and wanted to leave the job, and that as soon as he had more men he would send them to Linbeck. The conversation apparently finally terminated with Bowden telling Lawson that he had checked with his attorney and that he felt that he was on solid legal ground, and that Linbeck could take the matter to court if it wanted.[5]

On the same day, May 11, Superintendent Lawson sent a telegram to Business Agent Bowden with a copy to the International Ironworkers Union, stating the following:

> This is to advise you that you have improperly caused a work stoppage on the Laurette J. Howard Building at Baptist Hospital as a result of a work assignment dispute between your Union and the Carpenters Union. This conduct is in direct violation of the collective bargaining agreement and the National Labor Relations Act. We demand that you immediately man this job and submit your dispute in accordance with the proper procedure.

The reference to a collective bargaining agreement is

[5] The findings as to this conversation are based on a composite of the testimony of Lawson and Bowden. Lawson's testimony as to the incident contains no reference to Bowden's statement that the crew was dissatisfied with the job. Nor does Bowden's direct examination. Bowden's first allusion to it is on cross-examination. Bowden admitted the gist of the above findings as to his statements concerning the assignment of the Corspan work. As to the reference to having checked with his attorney, Bowden's testimony is that he may have made the statement in jest, but that he had not in fact consulted his attorney.

apparently to agreements between the various craft construction unions in the Jacksonville area and the particular contractors. As has been seen, there is no collective bargaining agreement between Linbeck and the Respondent. Lawson, unfamiliar with area practices, appears to have been under the erroneous impression at that time that there was a multiple-employer contract between the Jacksonville construction contractors association and the various unions. Bowden's testimony as to the telegram was that he did not see it, though conceding that it may have been delivered to his office.

On May 17, 1973, Linbeck filed the instant charge of violation of Section 8(b) (4), and on May 25 an amended charge. Linbeck also filed a charge of violation of Section 8(b) (4) (D) of the statute alleging the existence of a jurisdictional dispute, but this charge was later withdrawn.

The departure of Linbeck's ironworkers did not immediately affect the Corspan job, because the galvanized iron angles for attaching the Corspan to the building had at that time been installed on several floors. The testimony of Robert Boyle, President of Architectural, is that Corspan erection continued through the month of May and then shut down the first two weeks of June pending the installation of more angle iron.

At the time Linbeck's ironworkers left the Linbeck job, Blair Contracting Company, the structural steel contractor, had no ironworkers on the project. About May 18 or 20 Superintendent Lawson called Blair and asked for the loan of some of Blair's ironworkers. Blair then called Business Agent Bowden and asked Bowden if he had any problem on the Linbeck job, saying that he had more work to do on the project and wanted to be sure before he re-

turned. Bowden told Blair that there was no problem and that if Blair had any work to do at the project he should go ahead and do it. Blair did not loan any of his ironworkers to Linbeck.

THE RETURN OF THE IRONWORKERS

By May 30 the emergency job at the Kennedy project to which the Linbeck crew had been dispatched was substantially completed and the crew thereupon returned to Linbeck. Since that date there have been no interruptions and the Respondent has supplied Linbeck with all the ironworkers Linbeck has requested.

On June 7, 1973, a hearing was held in the United States District Court on the General Counsel's request for an injunction against the Respondent on the 8(b) (4) (B) charge.

THE JUNE 8 MEETING

On June 8, 1973, a meeting was held at the jobsite between representatives of the Respondent and representatives of the Carpenters. Representing the Respondent were John Walsh, an international representative, and Business Agent Bowden; representing the Carpenters were Van Pittman, an international representative, and Local 627 officials George Geiger and John Sea. Superintendent Lawson also attended. The purpose of this meeting was to attempt to resolve the underlying jurisdictional problem. This was essentially a meeting between international representatives. While Bowden's testimony is that he told International Representative Walsh that he was not interested in the Corspan work, it is undenied that the Ironworkers contended at this meeting that the issue should be

settled within the bounds of the 1967 agreement, and that Bowden said specifically "half the work is mine, we're entitled to it." Apparently nothing came of the meeting. Though its ostensible purpose might suggest that the Carpenters had reversed their previous position and were now claiming all the Corspan work, the evidence does not reflect such a development. I infer from the absence of indication of such a reversal, and from the fact that the 8(b) (4) (D) charge was withdrawn, that the Carpenters continued to agree that the ironworkers should share in the erection.

Other than what may be inferred from what has been stated, so far as the record discloses, neither Business Agent Bowden nor any other representative of the Ironworkers ever made any demand either upon Linbeck or upon Architectural Products that the work of erecting Corspan should be assigned to Ironworkers.

CONCLUSIONS

The complaint alleges that the Respondent engaged in a strike or work stoppage, and induced and encouraged individuals to so engage, and has threatened Linbeck and others through (a) action of Bowden and Thomas Canady on May 11, 1973 in withdrawing Linbeck's ironworkers, (b) threats by Bowden to Linbeck that the Respondent would not permit its members to work for Linbeck unless the ironworkers participated in the Corspan erection, and (c) refusal to refer ironworkers to Linbeck during the period from May 11 to May 30, 1973.

I find no evidence to sustain the allegation in (a) respecting Thomas Canady, the allegation in (b) that Bowden threatened Linbeck, or the allegation in (c) that the Re-

spondent refused to refer ironworkers to Linbeck. I will therefore recommend that those allegations be dismissed. That leaves for resolution the question whether the record establishes that the Respondent engaged in or induced and encouraged employees to engage in a work stoppage or strike. If so, the conclusion that they did must be bottomed on a finding that Business Agent Bowden's action in asking Steward Canady and Foreman Thrasher whether the crew would like to go on the Kennedy job and in providing them with referrals when the answer was affirmative constituted either: (1) the calling of a strike or work interruption by Bowden, or (2) the inducement or encouragement of one, or (3) that the action of the crew in leaving the job was itself a strike. Unless at least one of these alternatives can be found no violation has been established.

I find the evidence insufficient to warrant a conclusion that the employees' action in leaving the job was with a purpose by them to strike. This record will not support a finding that the employees themselves were animated by any motive in leaving the job other than the desire to secure the overtime work at Kennedy.[6]

This, however, does not end the matter, since Bowden's action in offering the crew the Kennedy employment and in dispatching them, if motivated by his displeasure over the Corspan assignment, may constitute the calling of a strike or inducement or encouragement of one. If that motivation was present I have no substantial problem with finding the inducement and encouragement, even if

[6] Or, perhaps, as Foreman Thrasher testified for himself, his dissatisfaction with the job.

the motivation were not communicated to and may have been unknown to the employees. An awareness that inducement or encouragement is taking place is not essential to a finding of their existence, anymore than is consciousness of fraud, deception, or seduction a condition of their being. However, to deem Bowden's conduct as constituting the calling of a strike may not immediately be so clear.

The coincidence of the withdrawals from the job without notice over the span of approximately one-half hour, with the disclosure to Bowden that the ironworkers would not participate in the Corspan erection work, raises a strong, and in the absence of effective rebuttal, irresistible, suggestion that the withdrawals were the result of the disclosure. Here, however, there are contra-indications on which the Respondent relies. Bowden's testimony is that he took the crew from the Linbeck job because (1) they were dissatisfied, (2) the Kennedy project, which involved the construction of a generator, was at that moment the more important one, and (3) earnings were greater because of the overtime, and the men had been asking for such an assignment. Bowden further testified that he was not interested in the Corspan work for the reason that he could not supply men to do it. There is evidence to support these assertions, and if there were not other factors tending to refute them, they might indeed carry the day. But on the totality of the evidence I am not persuaded that these were the substantial operative considerations.

If dissatisfaction with the job is equated with the desire for overtime work, I am willing to accept that in this respect the employees may have been dissatisfied. But I think it significant that this dissatisfaction, according to Bowden and Thrasher, had existed from the beginning of

the job. I therefore find it difficult to accept desire to assuage that discontent as a satisfactory explanation for the abrupt and coincidental transfer. And if by dissatisfaction is meant other specific grievances, such as safety conditions and the performance of ironworkers work by others, those are also of doubtful acceptability. Business Agent Bowden's testimony, I believe, makes plain that after his complaint to Superintendent Lawson in April with respect to safety conditions the matter was adjusted. With respect to the intrusion upon Ironworkers jurisdiction, Bowden's testimony is, as he himself explained to the crew, that this resulted from inability of Bowden to supply Linbeck with sufficient Ironworkers to perform the tasks.

This then leaves as possible motivation for the transfer of the crew the providential occurrence of the temporary emergency at the Kennedy project with its opportunity for overtime. In the absence of dispute I have accepted Business Agent Bowden's testimony as to the Kennedy development. Equally, but with somewhat more hesitation, I have also accepted the testimony of Bowden and Foreman Thrasher to the effect that the entire crew, without exception, accepted the transfer because of their desire for the overtime; for such unanimity of view, if overtime was the substantial attraction, seems surprising. On its face, then, the explanation for the transfer may have apparent plausibility. When combined with other admitted or uncontroverted evidence, it provides arguable surface support for the proposition that the work assignment was unrelated to the job shift. Thus, I find that had the ironworkers been permitted to participate in the erection of the Corspan, Bowden might have been unable to supply the necessary men. The additional work would only have provided him with additional problems in manning the projects in the area. In that sense, then, I think that we can

safely accept Bowden's testimony that he had no interest in the work. That conclusion, however, does not rule out the possibility that he had other interest in retaining it. Also supportive of the Respondent, to some extent, is the fact that the Respondent was under no obligation, contractual or otherwise, to man Linbeck's job. It had no contract with him and was under no legal requirement to supply him with labor. On the other hand, the Kennedy project presumably involved a contract relationship between the Respondent and the contractor. Bowden could thus, as he testified, feel under an understandable obligation to prefer supplying Kennedy to supplying Linbeck.

Other factors support the defense. Thus, as soon as the work at Kennedy was completed the crew was returned to Linbeck. In addition, while the crew was at Kennedy, Business Agent Bowden assured subcontractor Blair that he (Bowden) had not pulled the ironworkers off the Linbeck job and told Blair that he should continue with his work on the project using his Ironworker employees. In addition, it must be remembered that at no time did the Respondent make a specific demand on either Linbeck or Architectural Products for the Corspan work. On those facts the Respondent's defense thus has a *prima facie* plausibility. However, other facts tend to impair that conclusion.

In the first place there is the matter of coincidence, which, while not alone conclusive, is of weight. While the possibility of coincidence is not impossible of acceptance, the concurrence of events is sufficiently striking, in the circumstances, as to require rather convincing demonstration that it may satisfactorily be ascribed to coincidence.

Second is the fact that the crew was transferred precipitately in the middle of a shift. While an emergency involving preservation of life or property might well require abrupt action, there is no suggestion that the emergency on the Kennedy job was of such character. Third, Bowden gave Linbeck no prior notice of the situation, despite the fact that, according to Bowden, he was advised on the afternoon of the previous day of the Kennedy emergency. Indeed, his testimony is that on the afternoon of the tenth he sought to notify the Linbeck crew of the Kennedy opportunity, but they had already left the project for the day. On the following morning, though the crew began work at 7 a.m., Bowden did not speak to any of them until approximately 8:30, when he first talked to Steward Canady—and that conversation was neither on Bowden's initiative nor did it have reference to the Kennedy job. As we have seen, the conversation only came about because Canady called Bowden with reference to the iron workers' participation in Corspan erection. Over the period of apparently the next half hour Bowden, according to his testimony, had another conversation with Canady, and one with Lawson, in neither of which did he suggest that the Linbeck crew was needed at Kennedy. It was not until after he had been specifically advised by Lawson that the ironworkers would not participate in the Corspan erection that Bowden called Foreman Thrasher and advised him as to the availability of the Kennedy work. Even then Bowden did not inform Lawson of the situation. It was Lawson who had to call Bowden to ask the reason for withdrawal —a matter which took several hours. This despite the fact, according to Bowden, that he had decided prior to talking to Canady, Lawson, and Thrasher on May 11 that he would offer the men transfer to Kennedy. Bowden's studied silence on the subject of Kennedy until after he had learned of the decision as to the Corspan, is inconsistent

with any conclusion that up to that point he was seriously considering offering the crew transfer to Kennedy.

But, it is suggested, since Bowden had known for some days of the assignment of the Corspan work to the Carpenters, his conversation with Lawson on May 11 could not have precipitated the transfer. That conclusion does not follow, for the reason that Bowden first learned in the May 11 conversation that the ironworkers would not participate in the Corspan erection. Up until that time Bowden had assumed that the ironworkers and the carpenters would perform the erection with a composite crew, in accordance with the 1967 agreement and the understanding of the parties reached in the April meeting. That fact, I believe, is the clue to the subsequent action.

But apart from those inferences based on the circumstances, there is direct testimony that the job assignment was a factor in the transfer. Thus, when Lawson finally reached Bowden at 11:30 a.m. on May 11 and asked him the reason for the transfer, Lawson's testimony is that Bowden replied that they had not abided by area practice in assigning the Corspan work, and that he did not want "outsiders" coming in and disrupting the Trades Council by disregarding local agreements. Bowden admits that the 1967 agreement was discussed and stating that it should have been given some consideration, and further that he may have said that he had consulted his lawyer and felt that he was on sound legal ground. I think it a fair interpretation of this conversation, in the light of the background, that Bowden indicated to Lawson his displeasure with the Corspan assignment and additionally indicated that this was the reason for the transfer. In this respect it is significant, I think, that at no time did Bowden advise Lawson that the reason for the transfer was an emergency

job at Kennedy. His sole explanation to Lawson, according to Bowden's testimony, is that the men were "dissatisfied" and wanted to go on an overtime job. Queried on cross-examination as to why he did not give Lawson all the reasons for the transfer, Bowden's reply was that he did not think it was "necessary."

I think it follows from these facts, and I find, that Bowden took advantage of the availability of overtime employment on the Kennedy project as a pretext for offering the Linbeck crew the opportunity to transfer, and that he did this to exhibit his displeasure at the failure of the ironworkers to be assigned some of the Corspan work. That the ironworkers did not need the work is beside the point. As Bowden's statement to Lawson indicated, Bowden resented the fact that out-of-area contractors, none of them under contract with the Ironworkers, should come into Jacksonville and upset, or permit the upsetting, of jurisdictional agreements of long standing. It is not difficult to sympathize with that position. As we have seen, the 1967 agreement amicably, and apparently permanently, resolved a vexing and recurring dispute between the three unions. While there may be, and apparently was, reasonable difference of opinion as to whether or not the Carpenters or the Bricklayers should have primary jurisdiction under the 1967 agreement over the installation of Corspan, there is no apparent reasonable justification for the exclusion of the ironworkers from participation in the erection, since all the involved unions were in agreement in that respect. The insistence of out-of-area contractors, such as Architectural Products, with limited interest in the maintenance of stable jurisdictional arrangements in Jacksonville, or even more remotely interested manufacturers such as Johns-Manville, on disregarding that disposition, simply because of Johns-Manville's apparent insistence

upon the application of its own national policy scarcely seems reflective of concern for community interests, or of heed for the maintenance of peaceful and orderly labor relations in Jacksonville. It appears to me that, absent paramount contrary public considerations, and absent evidence of substantial economic considerations (of which there is none here), the deliberate overriding of reasonable union jurisdictional agreements which appear to have contributed to the stabilization of labor relations over a period of years, cannot tend other than to provoke action destructive of industrial peace. Indeed this case is a testimonial of that effect.

In this connection it is to be noted that the existing factual situation leaves the Ironworkers with no apparent remedy under the Act by which they can pursue their claim peacefully. The withdrawal of the 8(b) (4) (D) charge prevents the holding of a Section 10(k) hearing in which the Ironworkers might press their position before the Board, with possible favorable result.

However, the Iron Workers' valid grievance against Architectural Products and Johns-Manville does not, in the terms of the statute, justify retaliation against Linbeck, who, so far as the record reveals, has no control over the assignment policies of Architectural Products.

The facts that Business Agent Bowden told Subcontractor Blair that he had not pulled the ironworkers off the job, and that Blair should continue to work at the Linbeck project, and that following the completion of the emergency at Kennedy, Bowden returned the crew to Linbeck, and has since provided Linbeck with all the Ironworkers it needed, do not in the circumstances refute a conclusion that the withdrawal was a consequence of work assign-

ment. All these actions occurred after the instant unfair labor practice charges were filed, and in that context are of minimal probative value.

That the Iron Workers exclusion from the Corspan erection was a matter of concern to them is further evidenced by the fact that the June 8 meeting was held with international union representatives participating in an apparent effort to resolve the problem. As we have seen, Business Agent Bowden there specifically declared his position to the effect that the Iron Workers were entitled to half the work. That, as Bowden testified, he was not instrumental in calling that meeting and was not "interested" in the work, does not belie his position that the Iron Workers should have it.

OTHER CONTENTIONS

In addition to denying that the work assignment motivated the transfer of the crew to the Kennedy project, the Respondent raises several other contentions.

1. The Respondent asserts that Linbeck's motivation for filing the unfair practice charge was to pressure the Respondent into supplying Linbeck with all the Iron Workers he wished, to the prejudice of other employers in the area. As evidence of this Respondent's counsel points to the refusal of the General Counsel to consider any settlement without the concurrence of Linbeck, and to Linbeck's refusal to accept any adjustment or settlement of the case without a formal Board order and consent decree. Normally in the kind of situation disclosed by the evidence here, absent a history of recidivism or a past course of illegal conduct, an informal settlement agreement in which the Respondent committed itself not to engage in any of the conduct with

which it is charged, would have seemed to me an adequate remedy effectuating the policies of the statute and a proper conservation of public funds. There is no adverse history disclosed here. There is no explanation as to why a formal consent decree should have been required as a condition of settlement of the case. Furthermore, the Respondent points out, it has indicated its willingness to consider even such a decree, provided that legitimate inability to supply ironworkers because of shortages would not be considered an unfair labor practice.

I do not consider such facts to be a defense. Whatever unreasonableness they may reflect, they do not warrant dismissal of the complaint.

2. Secondly, the Respondent contends that the evidence will in no event sustain a conclusion that by removing the ironworkers Bowden sought to put pressure on Linbeck with an object of forcing Linbeck to cease doing business with Architectural Products. As to this, I conclude that a reasonably expectable tendency of the removal of the crew for the reason found, would be to force or require Linbeck to apply pressure to Architectural Products. I think it clear that the unions involved, including the Respondent, considered Linbeck, as the general contractor, to be a key figure in the determination of the assignment of the Corspan work, apparently even more pivotal in that respect than Architectural Products itself. Thus the April meeting of the three unions, called by the Bricklayers, was held in Lawson's office with Lawson present. At that meeting the Bricklayer business agent, Schuman, specifically asked Lawson to make the assignment to the Bricklayers. While it is true that Bowden made no such claim or request at the meeting on behalf of the Iron Workers, as Lawson put it in his testimony, "he didn't need to," for the reason

that the Carpenters and the Bricklayers were in agreement that in any event the Iron Workers were to share in the action. And in the telephone conversation on May 11 between Lawson and Bowden, when Lawson told Bowden that Architectural Products and Johns-Manville did not regard the Corspan as precast material, Bowden replied that as the general contractor Linbeck was responsible for the action of Architectural Products. Again, the meeting of union representatives on June 8 in an effort to resolve the assignment problem was held in Lawson's office at the jobsite with Lawson present.[7]

In this context I think it a fair inference that the withdrawal of the ironworkers from the Linbeck job had as a purpose or object forcing or requiring Linbeck to have Architectural Products assign the Corspan work in accordance with the union's agreement. In that situation a foreseeable tendency of the pressure on Linbeck would be to impel him to consider terminating his business relations with Architectural Products. Since Bowden's action in withdrawing the iron workers from Linbeck constituted a strike and inducement and encouragement of ironworkers to cease business relations with Architectural Products, Bowden's action constituted a violation of Section 8(b) (4) (i) (B) of the Act by the Respondent.

It is conceivable that the strike may also have had the

[7] With respect to this meeting Lawson testified that he did not join in the discussion and that he merely provided technical information concerning the method by which the Corspan is attached to the building. The significant fact, however, is that the unions throughout apparently considered Lawson to be an even more important figure in the resolution of the problem of the assignment than Architectural Products and Johns-Manville, neither of whom, so far as it appears in the evidence, was invited to participate in the discussions.

design of ultimately shutting down Architectural Products' installation of Corspan, since removal of the ironworkers ultimately had that effect. However if that was the thought, a question I find unnecessary to determine here, the fact does not negative the existence of the objective of having Linbeck cease business relations with Architectural Products.

3. The Respondent cites the case of *N.L.R.B.* v. *Carpenters District Council of Kansas City*, 439 F 2d 225, and 398 F. 2d 11, (C.A. 8), as supporting the proposition that a general contractor may not be a neutral employer, and thus validly be subject to a strike to compel a subcontractor to hire certain employees. In that case carpenters employed by a general contractor struck to have the general contractor require a masonary subcontractor to hire a carpenter on his masonary crews, assertedly in accordance with area practice. It is perhaps arguable that the opinions in that case suggest that, in the court's view, if a union has a valid claim that a subcontractor employ members of its union, and the general contractor has retained authority to dictate the makeup of the subcontractor's work force, the union may validly strike the general contractor to enforce its claim to the work. However, as I interpret the opinions in the *Carpenters District Council* case the question involved was whether the general contractor had subcontracted away the right to control the selection of the masonary crew. The court, in apparent agreement with the Board, held that he had done so and that therefore the strike by the general contractor's carpenters to compel the masonary subcontractor to hire carpenters was a violation of Section 8(b) (4) of the Act. Thus, the court said: "The general contractor by legally subcontracting the precast fabrications has placed it beyond his power to control the make up of the subcontractor's employees." In the present

case I am cited to no reservation of authority in Linbeck to control the makeup of Architectural Products crew which installed Corspan. The *Carpenters District Council* case is therefore not authority helpful to the Respondent.

4. Finally the Respondent argues that as the general contractor Linbeck has an inherent right of control over its subcontractor, Architectural Products, a principle reflected in some court decisions. However, the right of control test envisioned by the Respondent, and by some courts, has not been adopted by the Board. See for example *Local Union No. 438 et al (George Koch Sons, Inc.)* 201 NLRB No. 7. In the absence of contrary opinion of the Supreme Court, the Board's views are binding on me. The case of *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), cited by the Respondent, is not contrary opinion.

Summary of Findings

It is found and concluded that by the action of Business Agent Bowden in arranging for the transfer of Linbeck's ironworkers to the Kennedy project on May 11, 1973, the Respondent engaged in and induced and encouraged individuals to engage in a strike for the purpose of forcing and requiring Linbeck to cease doing business with Architectural Products, thereby violating Section 8(b) (4) (i) (B) of the Act.

It is further found that the Respondent has not engaged in unfair labor practices by any action of Thomas Canady, or by any threats to Linbeck, or by the Respondent refusing to refer Ironworkers to Linbeck.

Conclusions of Law

1. Linbeck Construction Corporation, and Architectural Products Inc., are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union No. 597 AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in, and by inducing and encouraging employees of Linbeck Construction Corporation to engage in, a strike against Linbeck, with an object of forcing or requiring Linbeck to cease doing business with Architectural Products Inc., the Respondent has violated Section 8(b) (4) (i) (B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not engaged in unfair labor practices by (1) any action of Thomas Canady, (2) threats by Business Agent Bowden to Linbeck, (3) by refusing to refer ironworkers to Linbeck, or (4) by any action violative of Section 8(b) (4) (ii) (B) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I issue the following recommended:[8]

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[8] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board,

ORDER

International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union No. 597, AFL-CIO, its officers, agents, successors and assigns shall:

1. Cease and desist from engaging in a strike against Linbeck Construction Corporation, or inducing or encouraging employees of Linbeck Construction Corporation to engage in a strike, with an object of forcing or requiring Linbeck to cease doing business with any other person.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in the Respondent's business offices, meeting halls, and all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days

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the findings, conclusions, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 12, sufficient signed copies of the aforementioned notice for posting by Linbeck Construction Corporation, Linbeck willing, at any of its places of business in Jacksonville, Florida, where notices to Linbeck's employees are customarily placed.

(c) Notify the Regional Director for Region 12, in writing, within 20 days after receipt of this decision, what steps the Respondent has taken to comply herewith.

The following allegations of the complaint are dismissed: (1) that Thomas Canady authorized, ratified or condoned employees of Linbeck to engage in a strike or to cease working for Linbeck; (2) that John Bowden threatened Linbeck; (3) that Respondent refused to refer ironworkers to Linbeck, and (4) that the Respondent thereby violated Section 8(b) (4) (ii) (B) of the Act.

Dated at Washington, D.C.

/s/ Charles W. Schneider
Administrative Law Judge

Form NLRB-4708
(9-69)

APPENDIX JD-574-73

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT strike or induce or encourage employees of LINBECK CONSTRUCTION CORPORATION to strike with an object of forcing or requiring LINBECK to cease doing business with any other person.

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFFILIATED LOCAL
UNION NO. 597, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 400 West Bay Street, Jacksonville, Florida 32202, Tel. No. (904)791-2168.

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 74-467-Civ-J-S

LINBECK CONSTRUCTION CORPORATION,
a Texas corporation,

Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFFILIATED LOCAL 597,

Defendant..

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This cause came before this Court on plaintiff's motion for partial summary judgment. The question of defendant's liability to plaintiff is no longer in controversy. At a hearing before this Court on November 24, 1975, counsel for both parties agreed that the decision of the National Labor Relations Board of January 21, 1974, involving the same issues and parties as this case, was *res judicata* as to liability. The question to be determined here is whether or not plaintiff is entitled to recover as damages in this case attorneys' fees and litigation expenses incurred in successfully prosecuting the unfair labor practice charge before the administrative law judge and the National Labor Rela-

tions Board. This Court holds that plaintiff is entitled to such recovery.

Briefly stated, plaintiff's claim is based on the following: On May 11, 1973, defendant caused workers who it represented to join in a concerted refusal to work at plaintiff's jobsite in Jacksonville, Florida. On May 17, 1973, plaintiff filed an unfair labor practice charge with the NLRB. After investigation of the charge, an administrative complaint was issued. A hearing was held before an administrative law judge on July 17, 1973. That judge found that defendant had violated Section 8 (b) (4) (B) of the National Labor Relations Act (29 U.S.C. § 158 (b) (4) (B)) when, on May 11, 1973, the ironworkers left plaintiff's jobsite. He further ruled, however, that defendant had not violated the Act by refusing to refer workers to plaintiff from May 11 through May 29, 1973, as plaintiff had charged. Both parties herein appealed the administrative judge's decision. The NLRB affirmed the decision on January 21, 1974. This suit was filed July 22, 1974.

It is well settled in this circuit that attorneys' fees and litigation expenses can be recovered in a suit brought under 29 U.S.C. § 187 when such expenses arise from plaintiff's participation in unfair labor practice proceedings before the National Labor Relations Board and when the expenses were necessitated by plaintiff's attempt to force a defendant to cease its illegal activity and to resume work. *Capeletti Brothers, Inc. v. Local 487 International Union of Operating Engineers, AFL-CIO,* 514 F. 2d 1239 (5th Cir. 1975); *Refrigeration Contractors, Inc. v. Local Union No. 211, United Assoc. of Journeymen & Carpenters of the Plumbing and Pipefitting Industry,* 501 F. 2d 668 (5th Cir. 1974); *H. L. Robertson & Associates, Inc. v. Plumbers Local Union No. 519,* 429 F. 2d 520 (5th Cir.

1970); *Sheetmetal Workers International Association, Local 223 v. Atlas Sheetmetal Company,* 384 F. 2d 101 (5th Cir. 1967. Acknowledging this principle of law, defendant asserts two arguments to limit plaintiff's recovery in this case. First defendant claims that litigation expenses can be recovered only if they were incurred in an effort to force the defendant to *resume work.* Defendant claims that in this case the ironworkers had resumed work long before the hearing before the administrative law judge. Defendant asserts that the ironworkers returned to the job around May 30, 1973; remained on the job from that time until July 17, 1973; and offered assurances to plaintiff that there would be no further work stoppage. Therefore, defendant asserts, all expenses from July 17, 1973, on, were not incurred in an effort to force a resumption of work and should not be recoverable.

Literally, defendant's ironworkers had resumed work on May 30, 1973. This fact alone, however, is not controlling of the issue here. On May 17, 1973, when the unfair labor practice charge was filed, defendant's men had not resumed work. The fact that they subsequently did, did not render the charge of illegal activity moot. It cannot be said that the pendency of the action had no bearing on defendant's decision to resume work. Nor can it be said that continued prosecution had no influence on their decision to stay on the job. If defendant could conduct illegal activities of short duration but voluntarily cease those activities prior to judicial review, then defendant could successfully circumvent 29 U.S.C. § 187 by placing an inordinate burden of prosecution, whether successful or not, on plaintiff. This cannot be permitted. While the cases cited above speak in terms of resumption of work rather than vindication of rights, in this case no distinction can be made between the two.

Defendant's second argument, asserted to this Court at oral arguments, is based on the following reasoning: Plaintiff's complaint charged illegal activity from May 11 until May 30, 1973—approximately 20 days. The NLRB, however, found a violation for only one day, May 11, 1973. Plaintiff can, therefore, recover actual damages for that day only. Defendant asserts that plaintiff's recovery for litigation expenses should likewise be *pro rated* at a 19 to 1 ratio.

There is no legal basis supporting defendant's assertion. Further, plaintiff's argument that *pro ration* should not be made is more convincing. The expenses incurred in litigating the charge, whether for one day or for 20, is approximately the same. Plaintiff was successful in establishing an unfair labor practice. This seems to be the controlling prerequisite for recovery of litigation expenses.

At one point this Court was concerned whether or not plaintiff would be entitled to recover litigation expenses for that portion of the expenses incurred in plaintiff's unsuccessful appeal of the administrative law judge's decision. After review of the cases, however, this Court finds no basis for limiting the recovery in this way. Plaintiff is, therefore, entitled to recover its entire litigation expenses. Those expenses were asserted to be $14,928.05. At a hearing before this Court that figure was found to be reasonable.

The actual damages suffered by plaintiff on May 11, 1973, remains to be established. Final judgment in this case will follow the Court's determination of those actual damages. Pre-trial conference on that issue is hereby set for 10:00 A.M., Monday, February 2, 1976, at 512 United States Court House and Post Office Building, Jacksonville,

Florida. Trial of that issue is hereby set at 10:00 A.M., Tuesday, February 17, 1976, in Court Room No. 2 at Jacksonville, Florida.

DONE AND ORDERED at Jacksonville, Florida, this 15th day of December, 1975.

BY /s/ CHARLES R. SCOTT
Judge

cc: Michael D. Malfitano, Esquire
Hugh E. Hackney, Esquire
Lacy Mahon, Jr., Esquire

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO. 74-467-CIV-J-S

LINBECK CONSTRUCTION CORPORATION,
a Texas corporation,

Plaintiff,

vs.

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFFILIATED LOCAL 597,

Defendant.

ORDER

This cause came before this Court on Plaintiff's and Defendant's Motion for Interlocutory Order Pursuant to 28 U.S.C. § 1292 (b) that immediate appeal is warranted and for an order staying proceedings pending the outcome of appeal. Plaintiff and Defendant have urged that the Court's Order Granting Partial Summary Judgment involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. Both parties urge that an interlocutory appeal is warranted in this case and therefore, it is

ORDERED, ADJUDGED AND DECREED that pursuant to 28 U.S.C. § 1292 (b) the Court is of the opinion that the attached order granting Plaintiff's Motion for Partial Summary Judgment involves a controlling question as to which there is a substantial ground for difference of opinion and that an immediate appeal therefrom may materially advance the ultimate termination of the litigation.

It is further ORDERED, ADJUDGED AND DECREED that the motion of Plaintiff and Defendant to stay all further proceedings in that certain action now pending between the same two parties requesting the interlocutory appeal is hereby granted pending the outcome of such appeal.

DONE AND ORDERED at Jacksonville, Florida this 31st day of March, 1976.

BY /s/ CHARLES R. SCOTT
United States District Judge

SUMMARY CALENDAR.*
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT
FEB. 28, 1977

NO. 76-3020

LINBECK CONSTRUCTION CORPORATION,
a Texas corporation,

Plaintiff-Appellee,

v.

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS AFFILIATED
LOCAL UNION NO. 597,

Defendant-Appellant.

Employer brought action against labor union to recover attorney fees and litigation expenses incurred in successfully prosecuting unfair labor practices charge before Administrative Law Judge and National Labor Relations Board, specifically, charge of engaging in unlawful secondary practices. The United States District Court for the Middle District of Florida, Charles R. Scott, J., granted partial summary judgment awarding plaintiff attorney fees and litigation expenses, and leave to appeal the interlocutory order was granted. The Court of Appeals held

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* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F. 2d 409, Part I.

that determination of a reasonable attorney fee is left to the sound discretion of the trial court and that although union members resumed work some 13 days following filing of unfair practice charges such fact did not render the charges moot and, hence, did not preclude award of attorney fees in prosecuting the charges before the Administrative Law Judge and the Board.

Affirmed.

1. Labor Relations 768

Reasonable attorney fees incurred in effectuating a resumption of work through proceedings before National Labor Relations Board may be recovered as damages sustained by an employer from unlawful secondary activities of a labor union. Labor Management Relations Act, 1947, §§ 303, 303(b), 29 U.S.C.A. §§ 187, 187(b).

2. Labor Relations 768

In view of number of hours spent in preparation the employer was entitled to recover over $15,000 expenses, including attorney fees, incurred in successfully prosecuting before Administrative Law Judge and National Labor Relations Board charge of unlawful secondary activities on part of labor union. Labor Management Relations Act, 1947, §§ 303, 303(b), 29 U.S.C.A. §§ 187, 187(b); National Labor Relations Act, §§ 1 et seq., 8(b) (4) (i, ii) (B) as amended 29 U.S.C.A. §§ 151 et seq., 158(b) (4) (i, ii) (B).

3. Courts 406.5(20)
Labor Relations 768

Determination of a reasonable attorney fee incurred by an employer in effectuating a resumption of work through proceedings before National Labor Relations Board charging labor union with unfair secondary activities is

left to sound discretion of the trial judge; reviewing court will not set aside his determination absent a clear abuse of that discretion. Labor Management Relations Act, 1947, §§ 303, 303(b), 29 U.S.C.A. §§ 187, 187(b).

4. Labor Relations 768

Fact that 13 days following filing of unfair labor practice charge, specifically, charge of unlawful secondary activity, the employees resumed work, did not render charge of illegal activity moot and hence, did not preclude award of attorney fees to employer for successfully prosecuting charge before Administrative Law Judge and National Labor Relations Board; it could not be said that pendency of the charges had no bearing on decision to resume work or that continued prosecution had no influence on the decision to stay on the job; legal expenses were incurred in an effort to force the union to cease its illegal activity and to force members to resume work. National Labor Relations Act, §§ 1 et seq., 8(b) (4) (i, ii) (B) as amended 29 U.S.C.A. §§ 151 et seq., 158(b) (4) (i, ii) (B); Labor Management Relations Act, 1947, §§ 303, 303(b), 29 U.S.C.A. §§ 187, 187(b).

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, HILL and FAY, Circuit Judges.

PER CURIAM:

Linbeck Construction Corporation filed and successfully prosecuted an unfair labor practice charge. This suit for damages was then instituted and the district court granted partial summary judgment awarding attorney fees and litigation expenses. This Court granted the parties leave to appeal from that interlocutory order. We determine that Linbeck is entitled to recover over $15,000 of expenses incurred in prosecuting the charge before the administrative law judge and the National Labor Relations Board and affirm.

The International Association of Bridge, Structural, and Ornamental Iron Workers, Affiliated Local Union No. 597, AFL-CIO, was charged with violating §8(b) (4) (i) (ii) (B) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. The complaint alleged that the Union had caused its members, or those employees that it represents who were employed by Linbeck on a work project in Jacksonville, Florida, to join in a concerted refusal to perform work for the purpose of inducing or coercing Linbeck to cease doing business with Architectural Products, Inc. A hearing was held before an administrative law judge where all parties were represented by counsel, presented evidence, cross-examined witnesses, and presented oral argument. The administrative law judge concluded that the Union had violated §8(b) (4) (i) (B) of the National Labor Relations Act. Both parties appealed the decision. The National Labor Relations Board amended the order and affirmed on January 21, 1974. 208 N.L.R.B. 524 (1974).

[1] This suit for damages, occasioned by the Union's illegal activity, was filed on July 22, 1974, pursuant to § 303 of the Labor Management Relations Act, 29 U.S.C. § 187. Section 303(b) provides that whoever has been injured in his business or property through unlawful secondary activities shall recover the (compensatory) damages sustained by him and the cost of the suit. The question of the Union's liability to Linbeck is not in controversy as both parties agreed that the decision of the National Labor Relations Board, involving the same issues and parties as this case, was res judicata as to liability. The

Union also concedes that this Court has repeatedly held that reasonable attorney's fees incurred in effectuating a resumption of work through proceedings before the National Labor Relations Board may be recovered by a successful § 303 plaintiff as damages sustained from the unlawful secondary activities of a union. See, *H. L. Robertson and Associates, Inc. v. Plumbers Local Union 519, etc.*, 5 Cir. 1970, 429 F. 2d 520; *Refrigeration Contractors, Inc. v. Plumbers Local Union 211, etc.*, 5 Cir. 1974, 501 F. 2d 668.

[2, 3] The Union's complaint, which formed the basis of this appeal, is that the attorneys' fees awarded to Linbeck were not reasonable and they were not incurred in effectuating a resumption of work. Substantial evidence was presented to the district court on the issue of the reasonableness of the attorneys' fees claimed as damages in this case. Based upon the affidavits submitted by counsel for Linbeck, the attorneys' fees were reasonable in light of the number of hours spent in preparation for all of these proceedings. The determination of a reasonable attorneys' fees is left to the sound discretion of the trial judge and this Court will not set aside that determination absent a clear abuse of that discretion. See, *Ferguson v. Winn Parish Police Jury*, 5 Cir. 1976 528 F. 2d 592; *McDonald v. Oliver*, 5 Cir. 1976 525 F. 2d 1217; *Weeks v. Southern Bell Telephone and Telegraph Co.*, 5 Cir. 1972, 467 F. 2d 95.

[4] In awarding partial summary judgment to Linbeck, the District Court adequately addressed the Union's contention that litigation expenses should be recoverable only when they are incurred in an effort to force the defendant to resume work:

> "Literally, defendant's ironworkers had resumed work on May 30, 1973. This fact alone, however, is not controlling of the issue here. On May 17, when the unfair labor practice charge was filed, defendant's men had not resumed work. The fact that they subsequently did, did not render the charge of illegal activity moot. It cannot be said that the pendency of the action had no bearing on defendant's decision to resume work. Nor can it be said that continued prosecution had no influence on their decision to stay on the job. If defendant could conduct illegal activities of short duration but voluntarily cease those activities prior to judicial review, then defendant could successfully circumvent 29 U.S.C. § 187 by placing an inordinate burden of prosecution, whether successful or not, on plaintiff. This cannot be permitted."

Attorneys' fees and litigation expenses can be recovered in a suite brought under 29 U.S.C. § 187 when such expenses arise from plaintiff's participation in unfair labor practice proceedings before the National Labor Relations Board and when the expenses are necessitated by plaintiff's attempt to force a defendant to cease its illegal activity and to resume work. *Capeletti Brothers, Inc. v. Local 487 International Union of Operating Engineers, AFL-CIO*, 5 Cir. 1975, 514 F. 2d 1239; *Sheetmetal Workers International Association, Local 223 v. Atlas Sheetmetal Company*, 5 Cir. 1967, 384 F. 2d 101. Also see, *Mason-Rust v. Laborers' International Union of North America*, 8 Cir. 1970, 435 F. 2d 939, wherein the court allowed as damages, attorneys' fees incurred after the work had been resumed because it was clear that the legal action played a decisive role in the Union's decision to terminate its activities.

The District Court correctly determined that plaintiff's legal expenses were incurred in an effort to force the Union to cease its illegal activity and to force the Union members to resume work. We find the amount awarded as attor-

neys' fees and litigation expenses reasonable. Therefore, the District Court order awarding partial summary judgment to Linbeck Construction Corporation is affirmed.

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-3020
Summary Calendar

D. C. Docket No. CA 74-467 J-S

LINBECK CONSTRUCTION CORP.,
a Texas Corporation,

Plaintiff-Appellee,

versus

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND
ORNAMENTAL IRON WORKERS,
Affiliated Local Union 597,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

Before GODBOLD, HILL and FAY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

February 28, 1977

Issued as Mandate:

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

June 14, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-3020 - Linbeck Construction Corp v. International Association of Bridge, Structural and Ornamental Iron Workers,

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Brenda M. Hauck
Deputy Clerk

cc: Mr. Joseph S. Farley, Jr.
Mr. Hugh E. Hackney

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

June 28, 1977

Mr. Joseph S. Farley, Jr.
Attorney at Law
350 East Adams St.
Jacksonville, FL 32202

No. 76-3020 - Linbeck Construction Corp., etc.
v. International Association of Bridge, Structural and Ornamental Iron Work rs, etc.

MANDATE STAYED TO AND INCLUDING JULY 28, 1977

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Susan M. Granier
Deputy Clerk

enc.

cc: Mr. Hugh E. Hackney

Supreme Court, U. S.
FILED
OCT 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-159

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, Affiliated Local Union 597,

Petitioner,

v.

LINBECK CONSTRUCTION CORP., A Texas corporation,

Respondent.

BRIEF OF LINBECK CONSTRUCTION CORP. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-159

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, Affiliated Local Union 597,

Petitioner,

v.

LINBECK CONSTRUCTION CORP., A Texas corporation,

Respondent.

BRIEF OF LINEBECK CONSTRUCTION CORP. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Whether litigation expenses incurred in effectuating a resumption of work in forums other than a federal court prior to filing suit under § 303 of the Labor-Management Relations Act can be recovered as damages sustained by a prevailing party in a § 303 action.

STATEMENT OF THE CASE

This case arose when Respondent, Linbeck Construction Corporation (hereinafter referred to as "Respondent"), filed an action for damages pursuant to §301 of the National Labor Relations Act, as amended, 29 U.S.C. §187 (1970) (hereinafter referred to as the "Act"), against the Petitioner, International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union 597 (hereinafter referred to as "Petitioner"), in the United States District Court for the Middle District of Florida, Jacksonville Division, on July 22, 1974.

The pertinent facts of this case are that on or about May 11, 1973 the Petitioner caused its members or those employees that it represents, employed by Linbeck on the Baptist Memorial Hospital project in Jacksonville, Florida, to join in a concerted refusal to perform work for the purpose of inducing or coercing Respondent to cease doing business with Architectural Products, Inc. On May 17, 1973, Respondent filed an unfair labor practice charge with the National Labor Relations Board (hereinafter referred to as "NLRB"), pursuant to the provisions of the Act, 29 U.S.C. 58(b)(4)(i)(B) (1970). After an investigation of the charge, an Administrative Complaint was issued by the NLRB and a hearing was held before a duly designated Administrative Law Judge on July 17, 1973.

Following the hearing at which time all parties were represented by counsel, presented evidence, cross-examined witnesses, and presented oral arguments, the Administrative Law Judge issued his recommended decision on September 20, 1973, finding the Petitioner in violation of §8(b)(4)(i)(B) of the Act. Further, on January 21, 1974, the NLRB issued its decision, finding that the Petitioner had unlawfully violated §8(b)(4)(i)(B) of the Act.

As a result and proximate cause of the unlawful conduct of the Petitioner complained of in the instant case, the Respondent was forced to hire counsel for the purpose of instituting legal action to remove picket signs from its jobsite in Jacksonville, Florida, and otherwise effectuating a resumption of work in the aftermath of the unlawful work stoppage resulting from Petitioner's conduct.

Respondent, in an attempt to expedite the hearing of this matter before the trial court, filed a motion for partial summary judgment requesting that it be awarded reasonable litigation expenses incumbent in litigation necessary to effectuate a resumption of work which had been stopped by the illegal secondary activity of the Petitioner.

Based upon the pleadings, affidavits and interrogatories on file at the time of the hearing on the Motion for Partial Summary Judgment, the district court found that Respondent was entitled to a partial summary judgment. In a further effort to expedite the handling of this matter, the parties involved requested permission to file an interlocutory appeal on the controlling issue of law. A motion for interlocutory appeal was granted by the district court and accepted by the Court of Appeals for the Fifth Circuit. A panel of the Fifth Circuit unanimously affirmed the trial court decision in favor of Respondent, and Petitioner's Petition for Rehearing and Petition for Rehearing en Banc were denied.

ARGUMENT

I. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IN *International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union 597* v. *Linbeck Construction Corporation, 547 F2d 948 (1977)*, IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT IN *Alyeska Pipeline Service Co.* v. *Wilderness Society, 421 U.S. 240 (1975)*, AND *Local 20 Teamsters Union* v. *Morton, 377 U.S. 252 (1964)*.

The instant case does not involve the award of attorneys' fees to a prevailing party in federal litigation absent a statutory or contractual authorization for such attorneys' fees. As Petitioner concedes in its brief to this Court, the instant case also does not involve the concept of the "private attorney general".[1] Nor does this case involve any exercise of the equitable power of the federal courts to fashion an exception to the "American rule" that litigation expenses will not be awarded to a prevailing party in federal litigation absent an exception to that rule traditionally recognized by this Court. In short, the instant case does not involve any of the policy considerations underlying this Court's decision in *Alyeska Pipeline, supra*.

In *Alyeska Pipeline*, this Court specifically condemned the "private attorney general" exception to the American Rule of awarding of attorneys' fees and generally reaffirmed the policy embodied in the "American Rule". 421 U.S. 269-70.

However, this Court, in *Alyeska Pipeline*, did not hold that litigation expenses could not be an element of *damages*

[1] Brief for Petitioner at 8.

when such damages were incurred in a forum other than a federal court and as a consequence of the unlawful activity of the person later made a party defendant to a federal suit filed pursuant to § 303 of the National Labor Relations Act, 29 U.S.C. §187(a)-(b) (1970).

§ 303 provides in relevant part that:

> (a) It shall be unlawful . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 158 (b)(4) . . ..
>
> (b) [W]hoever shall be injured in his business or property by reason [of] any violation of subsection (a) . . . may sue therefore in any district court of the United States . . . and shall recover the damages by him sustained and the costs of the suit.

The Fifth Circuit, as well as apparently all circuits that have considered the issue, has consistently recognized that the cost of litigation necessary to cause a cessation of unlawful activity by a Union can properly be considered an element of *damages* in a subsequent § 303 suit against the Union. *See e.g., Linbeck Construction Corp., supra; Refrigeration Contractors, Inc.* v. *Local Union 211, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 501 F.2d 668, 671 (5th Cir. 1971); *Mason-Rust Laborers' Int'l Union of North America, AFL-CIO, Local 42*, 435 F.2d 939, 948 (8th Cir. 1970); *Vulcan Materials Co.* v. *United Steelworkers*, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971); *Local Union 984, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* v. *Humko Co.*, 287 F.2d 231, 243 (6th Cir. 1961), *cert. denied*, 366 U.S. 962 (1962).

The Fifth Circuit, as well as other circuits, clearly recognizes the distinction between damages awarded for administrative proceedings before the NLRB, necessary to end an unlawful work stoppage and to obtain a resumption of work, and attorneys' fees claimed by a party bringing a § 303 suit. As the Petitioner concedes, the Fifth Circuit has denied attorneys' fees to a prevailing party for bringing a § 303 action.[2] *See, e.g., Capeletti Bros., Inc.* v. *Local No. 487, Int'l Union of Operating Engineers, AFL-CIO*, 514 F.2d 1239, 1240-41 (5th Cir. 1975). *See also Local Union 984, Int'l Union of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* v. *Humko Co., Inc.*, 287 F.2d 231, 243-44 (6th Cir. 1961), *cert. denied* 366 U.S. 962 (1962).

Petitioner's contention that the decisions of the Fifth, Sixth, and Eighth Circuits are in conflict with a decision of the Ninth Circuit is erroneous. The Ninth Circuit decision in *Mead* v. *Retail Clerks International Ass'n, Local Union No. 839, AFL-CIO*, 523 F.2d 1371 (1975) must be read in conjunction with a subsequent decision of the Ninth Circuit in *Sillman* v. *Teamsters Local Union No. 386, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 535 F.2d 1172 (9th Cir. 1976). In *Sillman*, decided seven months after *Mead*, the Ninth Circuit, without even citing *Mead*, apparently upheld an award of litigation expenses for prior NLRB litigation. The *Sillman* decision condemns only the award of litigation expenses for bringing a subsequent § 303 action, and does not discuss the issue of litigation expenses as damages for the prior NLRB proceedings. In addition, the *Sillman* court cites for authority decisions of the Fifth and Sixth Circuits upholding the award of litigation expenses for prior proceedings in other forums. 535 F.2d at 1175.

[2] Brief for Petitioner at 9.

Thus, the Ninth Circuit has either overruled *Mead, sub silencio*, or clarified *Mead* to bring it into conformity with the decisions of other circuits that litigation expenses for prior litigation may be damages, but litigation expenses cannot be awarded for bringing the § 303 proceeding.

The critical distinction the Petitioner has missed is that between litigation expenses awarded for a § 303 action, and litigation expenses as damages for prior proceedings, independent of the § 303 action, necessitated by the unlawful conduct of the Petitioner. As the Sixth Circuit has recently held in a case challenging litigation expenses as damages for proceedings prior to the filing of a suit under § 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1970):

> The Supreme Court in *Alyeska* reaffirmed the traditional American Rule that attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization. We do not read the decision as in any way affecting those cases in which the attorneys' fees are not an award to the successful litigant in the case at hand, but rather are the subject of the lawsuit itself. More particularly, we do not understand that the decision in *Alyeska* in any way affects the measure of damages which can be awarded to a prevailing plaintiff in a suit for breach of a union's duty of fair representation in an action under § 301.

Scott v. *Local Union 377, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 548 F.2d 1244, 1246 (6th Cir. 1977).

There is also no merit in Petitioner's further contention that the decision of the Fifth Circuit in the instant case is in conflict with the decision of this Court in *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252 (1964). In *Morton*, this Court held that damages under § 303

are limited to compensatory damages and thus do not include any award for punitive damages. *Id.* at 260-61. Clearly, compensatory damages within the meaning of § 303 can include litigation expenses incurred in forums other than a federal court, prior to the filing of a § 303 suit, when such litigation expenses were incurred as a direct result of the unlawful activity of the § 303 defendant. All courts that have considered this issue have reached this result. *See, e.g., Linbeck Construction Corp.* v. *International Association of Bridge, Structural & Ornamental Iron Workers, Affiliated Local Union No. 597*, 547 F.2d 948, 950 (5th Cir. 1977); *Vulcan Materials Co.* v. *United Steelworkers of America, AFL-CIO*, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied* 401 U.S. 963 (1971); *Mason-Rust* v. *Laborers International Union, Local 442*, 435 F.2d (8th Cir. 1970); *H.L. Robertson & Associates* v. *Plumbers Local Union No. 519, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO*, 429 F.2d 520, 522 (5th Cir. 1970).

Thus, the decision of the Fifth Circuit in this case is not in conflict with the decisions of this Court in *Alyeska Pipeline* and *Morton*.

II. THE FIFTH CIRCUIT CORRECTLY INTERPRETED THE MEASURE OF DAMAGES IN A SECTION 303 PROCEEDING TO BE THOSE DAMAGES INCURRED IN PRIOR PROCEEDINGS THAT WERE NECESSARY TO EFFECTUATE A RESUMPTION OF WORK.

The measure of damages in the form of litigation expenses for prior proceedings in other forums, applied by the Fifth Circuit in the instant case, was whether the damages as litigation expenses were incurred in effectuating a resumption of work. This position is a settled rule of all courts

that have considered the issue. *See Linbeck Construction Corp.* v. *International Association of Bridge, Structual and Ornamental Iron Workers, Affiliated With Local Union No. 597*, 547 F.2d 948, 950 (5th Cir. 1977); *Capeletti Bros., Inc.* v. *Local 487*, 514 F.2d 1239, 1241 (5th Cir. 1975); *Refrigeration Contractors, Inc.* v. *Local Union 211, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 501 F.2d 668, 671 (5th Cir. 1974); *Mason-Rust Laborers; Int'l Union of North America, AFL-CIO*, 435 F.2d 939, 948 (8th Cir. 1970); *Vulcan Materials Co.* v. *United Steelworkers*, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971); *Abbott* v. *Local Union 142 of the United Ass'ns of Journeymen and Apprentices of the Pipefitting Industry*, 429 F.2d 786, 790 (5th Cir. 1970); *H. L. Robertson & Associates, Inc.* v. *Plumbers Local 519, United Ass'n. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 429 F.2d 520, 522 (5th Cir. 1970); *Sheet Metal Wkrs. Int. Ass'n, Local 233* v. *Atlas Sheet Metal Co.*, 384 F.2d 101, 110 (5th Cir. 1967); *Gulf Coast Building & Construction Trades Council* v. *F.R. Hoar & Son, Inc.*, 370 F.2d 746, 748 (5th Cir. 1967); *Construction and General Laborers Local 438* v. *Hardy Engineering and Construction Co., Inc.*, 354 F.2d 24, 27 (5th Cir. 1965); *Aircraft and Engine Maintenance and Overhaul, Building, Construction, Mfg., Processing and Distribution, Local 290* v. *I.E. Schilling Co., Inc.*, 340 F.2d 286, 289 (5th Cir. 1965); *Local Union 984, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* v. *Humko Co. Inc.*, 287 F.2d 231, 243 (6th Cir. 1961), *cert. denied*, 366 U.S. 962 (1962).

Petitioner argues that the litigation expenses as damages awarded by the trial court for Respondent's prior expenses before the NLRB were not properly incurred in effectuating a resumption of work. Petitioner's contention was resolved against it by the trial court which examined affidavits filed by the Respondent regarding its litigation expenses and held

a full evidentiary hearing at which the trial court concluded that the prior litigation expenses incurred by the Respondent were properly incurred in effectuating a resumption of work. The Fifth Circuit affirmed and cited with approval the fact finding of the trial court that:

> It cannot be said that the pendency of the [NLRB] action had no bearing on defendant's decision to resume work. Nor can it be said that continued prosecution had no influence on their decision to stay on the job.

Linbeck Construction Corp. v. *International Ass'n. of Bridge, Structural, and Ornamental Iron Workers, Local Union No. 597*, 547 F.2d 948, 950 (5th Cir. 1977).

The fact finding of the trial court that Respondent incurred its litigation expenses in effectuating a resumption of work is supported by substantial evidence.

III. THE DECISION IN THE INSTANT CASE CORRECTLY APPLIED THE RULES OF RES JUDICATA OR COLLATERAL ESTOPPEL TO THE FACTS OF THE CASE AND THERE WAS NO FAILURE ON THE PART OF THE RESPONDENT TO MITIGATE ITS DAMAGES.

Petitioner correctly notes that the finding of unlawful activity by the NLRB was res judicata or collateral estoppel on the issue of the Petitioner's liability to Respondent in the subsequent §303 proceeding. Petitioner further argues, however, that the finding of a one-day violation by the NLRB is conclusive proof that litigation expenses incurred by the Respondent after the date of the one-day violation found by the NLRB were not incurred in effectuating a resumption of work. Petitioner's argument demonstrates a basic misunderstanding of the concept of effectuating a resumption of work.

The fact that the NLRB found a one-day violation does not mean that litigation expenses incurred by the Respondent for its participation in the NLRB proceedings that ultimately led to a finding of a one-day violation were not incurred in effectuating a resumption of work. The fact that the unlawful activity of Petitioner may have physically ceased before the NLRB determined that Petitioner had engaged in a one-day violation of the Act does not mean that the proceedings before the NLRB did not effectuate a resumption of work by forcing the Petitioner to physically cease its unlawful activity and prevent continuing unlawful activity by Petitioner arising out of the same transaction or occurrence that led Petitioner to initially commence its unlawful activity. As evidenced in Section *B* of this brief, *supra*, the trial court found as a matter of fact that the NLRB proceedings were instrumental in preventing a reoccurrence of unlawful activity by the Petitioner and the Fifth Circuit specifically affirmed this finding.

Petitioner's final contention that Respondent failed to mitigate its damages is totally without merit. First, Petitioner appears to misunderstand the interrelationship between a proceeding before the NLRB alleging an unlawful labor practice pursuant to §8(b)(4)(i)(ii)(B) and a proceeding in a federal court pursuant to §303. In enacting §303, Congress provided a statutory remedy for damages under §303 which could be maintained in federal courts regardless of the outcome of proceedings between the same parties before the NLRB. Therefore, §303 is cumulative of the rights and remedies available to a charging party before the NLRB. Thus, there is no requirement of election of forums, either of federal court or the NLRB, for a person who has been injured as a result of activity made unlawful by both §303 and §8(b)(4). Before the NLRB, a charging party is seeking an end to unlawful activity and a resumption of work. In a §303 suit, a plaintiff is seeking recovery

for the "damages sustained" as a result of the unlawful work stoppage.

It is worth noting that there is not a single citation in Petitioner's brief for the novel argument that resorting to the administrative machinery of the NLRB, the agency with special expertise in labor-management relations, is a failure to mitigate damages for the purposes of a subsequent § 303 suit. The only citation in Petitioner's brief for the general duty of a § 303 plaintiff to mitigate damages is *Vulcan Materials Co.* v. *United Steelworkers*, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971), in which the Fifth Circuit specifically allowed litigation expenses incurred in prior NLRB proceedings as damages sustained for purposes of a § 303 action.

CONCLUSION

For the reasons set forth above, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

FULBRIGHT & JAWORSKI

BY: .....

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ATTORNEYS FOR RESPONDENT LINBECK CONSTRUCTION CORP.

CERTIFICATE OF SERVICE

I, the undersigned counsel of record for Respondent, Linbeck Construction Corp., hereby certify that on this the 19th day of October, 1977, I have mailed, postage prepaid, copies of the foregoing brief to counsel listed below:

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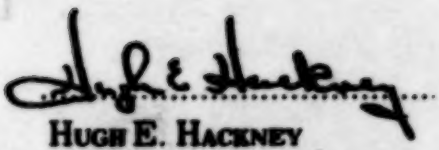

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